Filed 2/24/05 In re I.S. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re I.S., a Person Coming Under the Juvenile Court Law.	B175910 (Los Angeles County Super. Ct. No. CK10564)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOHN K., Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Emily A. Stevens, Judge. Affirmed.

Mary Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond Fortner, County Counsel, Larry Cory, Assistant County Counsel, and Jerry M. Custis, Deputy County Counsel, for Plaintiff and Respondent.

John K. (appellant), an alleged father, appeals from the termination of his parental rights to I.S. (the minor). We find no error and affirm.

FACTS[1]

Background

The minor was born premature and tested positive for cocaine. Her mother (mother) admitted to using cocaine and alcohol during her entire pregnancy. Thereafter, the minor was detained by the Department of Children and Family Services (the Department) on July 21, 2000. She was subsequently declared a dependent of juvenile court.

No reunification services were ordered, and the juvenile court set a Welfare and Institutions Code section 366.26 hearing.[2]

Eventually, mother said appellant might be the minor's father.[3] The Department searched for appellant and published a newspaper notice to his attention regarding the section 366.26 hearing. Still, by October 2, 2001, his whereabouts were unknown. Long-term foster care was adopted as the permanent plan, subject to regular review.

In September 2002, the Department transferred the minor from her then-current foster mother to the custody of Mr. and Mrs. H. (The H.s), the caretakers of the minor's older brother, S.P. Soon after, mother gave birth to a baby girl named B.S. B.S. was also placed with the H.s. By March 2003, the H.s were in the process of adopting S.P. and wanted to adopt the minor and B.S.

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1 In accord with the usual rules on appeal, we state the facts in the manner most favorable to the juvenile court's orders. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

2 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

3 The spelling mother gave of appellant's last name was incorrect.

Appellant's appearance

Appellant called the Department on May 20, 2003, to say that he wanted custody of the minor. He explained that he had been incarcerated in Texas, but that he was currently residing in Costa Mesa, California. The Department scheduled a visit for appellant and the minor, but appellant did not appear. A social worker called appellant to inquire about his absence. He said he had forgotten about the visit but that he could still make it over to the social worker's office. But then he called back 10 minutes later to say that he was too tired and did not think he could drive the long distance without having an accident. He did not make any further contact with the social worker through August 2003. According to appellant's mother, he had been incarcerated and was due to be released on August 27, 2003.

Ultimately appellant was incarcerated again due to a parole violation and his expected release date was April 18, 2004.

The section 366.26 proceedings

On March 2, 2004, appellant appeared at the section 366.26 hearing. He was in custody at the time. He explained that it was in June 2000, while he was incarcerated in Texas, that he learned that mother was pregnant. As of the hearing, appellant had never seen the minor.

The juvenile court changed the minor's permanent plan to adoption and continued the matter for further proceedings.

Appellant was opposed to having his parental rights terminated and he wanted to be involved in the minor's life. On May 13, 2004, he was found to be the minor's alleged father. Approximately a month later, appellant requested a DNA test. He told the juvenile court: "As far as being presumed or alleged, all I ask for was a DNA. If it was my baby, I was willing to fight for whatever reasons that I could just to make sure if it was my baby. I wanted to do something positive in [the minor's] life. I don't even know if it is my baby, but I wanted to do something that was positive." The juvenile court

denied appellant's request and terminated his parental rights. In the order he was identified as the minor's "father."

This timely appeal followed.

DISCUSSION

According to appellant, the juvenile court erred when it refused to order a paternity test. Alternatively, at a minimum, appellant requests that we remand the matter back to the juvenile court to amend the termination order to reflect that he is an alleged father, not a "father." We turn to these issues.

1. *The juvenile court did not abuse its discretion when it denied appellant's request for a paternity test*.

Family Code section 7551 is the statute that authorizes genetic testing. It provides in relevant part: "In a civil action or proceeding in which paternity is a relevant fact, the [juvenile] court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests." The roadmap for applying this statute is *In re Joshua R.* (2002) 104 Cal.App.4th 1020 (*Joshua R.*).

The alleged father in *Joshua R.* learned of his potential parenthood when the child at issue was 17 months old. However, he waited until the child was five years of age, and the subject of a third dependency proceeding, before requesting a paternity test. (*Joshua R.*, *supra*, 104 Cal.App.4th at p. 1026.) His request was denied. The juvenile court reasoned that a paternity test was irrelevant because the alleged father could not qualify as a presumed father. (*Id*. at p. 1025.) On appeal, the court agreed that a paternity test would have been irrelevant. (*Ibid*.)

The *Joshua R.* court explained that only a presumed father is entitled to receive reunification services and custody. (*Joshua R.*, *supra*, 104 Cal.App.4th at p. 1025.) As a result, the alleged father could not obtain either. Even had the alleged father established that he was a biological father, the court opined that the result would not change. (*Ibid*.)

Joshua R. went on to acknowledge that a juvenile court has the discretion to offer reunification services to a biological father if it would benefit the child. (*Id*. at p. 1026.) "However," the court concluded, the juvenile court "implicitly rejected that option when it found paternity irrelevant and denied [the alleged father's] request for genetic tests. Underlying that decision is the implied finding the [child] would not benefit from the provision of services to [the alleged father]. That finding is supported by overwhelming evidence." (*Ibid*.) The court found that a criterion for mandatory genetic testing was unmet and the test was, at best, discretionary and its denial was subject to reversal only for an abuse of discretion. (*Id.* at pp. 1026, 1028.)

As the court explained, "'"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' [Citation.]" (*Joshua R.*, *supra*, 104 Cal.App.4th at p. 1028.) The question thus became whether the juvenile court's implied finding that the child would not benefit from having his father identified could reasonably be deduced from the facts. (*Ibid*.) The court reviewed the alleged father's history of failing to make good on his promise to make the child a priority once the alleged father was released from prison. This led the court to state: "In determining whether a paternity test would serve the [child's] best interests, the juvenile court had to consider whether [the alleged father] has demonstrated a real commitment to the child's welfare. Undeniably, he has not. Particularly relevant to that determination is the evidence of [the alleged father's] persistent failure to seek visitation or custody, to provide financial support, or to participate in dependency hearings so crucial to the [the child's] present and future well being. Given this record, we cannot say the court exceeded the bounds of reason in concluding the minor would reap no benefit from allowing [the alleged father] a paternity test." (*Id*. at p. 1029.)

Here, the analysis is much the same. Paternity testing would not have entitled appellant to reunification services or custody.

Impliedly, the juvenile court found that it would not be in the minor's best interests to establish appellant's paternity and then give him reunification services under section 361.5, subdivision (a).[4] That implied finding, as in *Joshua R.*, was supported by the evidence. Appellant never met the minor and never developed a relationship with her. He knew that mother was pregnant in 2000, yet he did not come forward until May 2003 regarding his potential parenthood. Even then, he did not avail himself of the opportunity to meet and get to know the minor. His incarcerations created logistical problems for appellant, but for that he bears the fault. In contrast, the record shows that the minor was in a loving home and, further, that the H.s wished to adopt the minor, her older brother, S.P., and her younger sister, B.S. Given these facts, the record recommends a permanent plan of adoption.

In counterpoint, appellant contends that his case is distinguishable from *Joshua R.* and "[provides] much different circumstance from which to assess relevancy. [Appellant's] status may not have been worth much *yet* in protecting [the minor's] paramount interests, interests which were no doubt in security and permanency. . . . This said, assuming [appellant] was found to be [the minor's] biological father, he did not have the same negative factors [as in *Joshua R.* that] would make it unrealistic to see how he could ever get beyond the first critical step to eventually being a father to his child." Appellant concedes that even if his paternity were established, he would not be entitled to custody and, absent obtaining presumed father status, he could be denied reunification

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[4] Section 361.5, subdivision (a) provides: "Except as provided in subdivision (b), or when the parent has voluntarily relinquished the child and the relinquishment has been filed with the State Department of Social Services, or upon the establishment of an order of guardianship pursuant to Section 360, whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child."

services. But then he states that he "would still have been entitled prior to rights being terminated to move under section 388 to have the [juvenile] court consider changing the direction of [the minor's] case, and give him an opportunity to develop a relationship with her through visits." In conclusion, he argues that "his actions and statements showed [the minor that] having a full and enduring relationship with her father was very much possible. If indeed, [the minor] could achieve permanency within her own family, this furthered the paramount goals of dependency law to preserve the family whenever possible. . . . And very much advanced her best interests."

The flaw in appellant's argument is that it is not tailored to the standard of review. In essence, he is challenging the juvenile court's implied findings. "When we review a sufficiency of the evidence challenge, we may look only at whether there is any evidence, contradicted or uncontradicted, which supports the trial court's determination. We must resolve all conflicts in support of the determination, and indulge in all legitimate inferences to uphold the court's order. Additionally, we may not substitute our deductions for those of the trier of fact. [Citation.]" (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) Despite this rule, appellant has not attempted to demonstrate that substantial evidence is lacking. Rather, appellant is arguing the matter anew as though we are the triers of fact. But we are not, and we are bound by the rules of appellate law. As we explained, the juvenile court's order was supported by the evidence. We are not at liberty to substitute our own deductions. Here, based on the lack of a relationship between appellant and the minor, and based on the fact that the H.s's wish to adopt the minor and her siblings, there is an undeniable inference that the minor would not benefit from reunification services being given to appellant, a person who, despite a possible biological tie, is a complete stranger to the minor. Because this inference supports the juvenile court, it must be indulged.

In our view, a criterion for mandatory testing -- relevancy -- was not established, so the issue is whether the juvenile court erred in refusing to exercise its discretion to grant appellant's request. As in *Joshua R.*, the question is whether it can be deduced

from the facts that the minor would not benefit from having appellant identified as her father. Such a deduction is supportable. Appellant simply did not have a relationship with the minor. Though he appeared at some hearings and therefore showed somewhat more commitment than the alleged father in *Joshua R.*, appellant's commitment to the minor was still far below the threshold that would require it to be given serious consideration. He waited almost three years before coming forward to claim potential parenthood, and even then he did not visit the minor. Paternity, by itself, is not enough to establish a benefit to a dependent child. "Case law holds that mere *biological* fatherhood, unaccompanied by a parent-child *relationship*, is worth little in the dependency context. [¶] . . . [The] biological connection between father and child is unique and worthy of constitutional protection *if* the father grasps the opportunity to develop that biological connection into a full and enduring relationship.' (Italics added.)" (*Joshua R.*, *supra*, 104 Cal.App.4th at p. 1029.)

Appellant argues that, in contrast to *Joshua R.*, his biological connection "was still very much worthy of constitutional protection." We disagree. He did not grasp the opportunity to develop his possible biological connection into a full and enduring relationship. Instead, he failed to visit the minor during the times when he was in California and not incarcerated.

Under the facts presented, the juvenile court did not abuse its discretion.

Our decision is bolstered by *In re Ninfa S.* (1998) 62 Cal.App.4th 808. There, an alleged father appeared at a section 366.26 hearing and requested a continuance in order to complete a paternity test. The court stated: "[The alleged father] does not explain how this information would have been relevant to any issue decided at the [section 366.26] hearing. A [section 366.26] hearing is concerned only with a long-term placement plan for the child, the preferred alternative being adoption and termination of parental rights. The court first decides whether it is likely the child will be adopted if parental rights are terminated. If so, the court examines whether termination of parental rights will be detrimental to the minor based on four enumerated circumstances. '[T]here is no window

of evidentiary opportunity for a parent to show that in some general way the "interests" of the child will be fostered by an order based on some consideration not set forth in section 366.26.' [Citation.] [¶] Here, genetics is irrelevant to either the likelihood of Ninfa's adoption or any of the four enumerated exceptions which might make termination of parental rights detrimental to Ninfa. Because further delay of the hearing would have interfered with Ninfa's need for prompt resolution of her custody status and her right to a permanent placement, and the sole reason asserted for continuing the hearing was to adduce information irrelevant to the pending proceeding, the court did not abuse its discretion by denying the continuance." (*In re Ninfa S., supra*, 62 Cal.App.4th at p. 811.)

This quote highlights an issue we have yet to touch upon: the timeliness of the request. Appellant made his request at a time when his paternity was not relevant to any considerations under review at the section 366.26 hearing, and at a time when the test could only delay the minor's permanent plan. Moreover, we point out that appellant seeks to interrupt the minor's second permanent plan, not her first. As a result, any delay would have been all the more egregious. The tardiness of the request further supported its denial.

2. *The order terminating parental rights need not be reformed*.

"The rights of the mother, any presumed father, any alleged father, and any unknown father or fathers must be terminated in order to free the child for adoption." (Cal. Rules of Court, rule 1463(g).)

The order terminating parental rights stated: "The [juvenile] court finds that it will be detrimental for minor(s) to be returned to the parent(s) and parental rights are terminated. The minor(s) is/are declared free from the custody and control of his/her/their mother, [mother], father, [appellant]; IDENTITY UNKNOWN FATHER, and as to any and all other person or persons presently known or unknown who shall hereafter claim or allege maternity or paternity."

Appellant opines that this order prejudices him as to any future child he might have that might be a subject of a dependency proceeding. His theory is as follows:

Section 361.5, subdivision (a) provides that reunification shall be provided when a child is removed from a parent, except as set forth in subdivision (b). Under subdivision (b)(10), reunification services need not be provided when a juvenile court finds that "the court ordered termination of reunification services for any siblings of the child because the parent or guardian failed to reunify with the sibling after the sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling of that child from that parent or guardian."

Appellant argues that because he was called a "father" instead an "alleged father," he can be penalized under section 361.5. He contends that the order must be amended to show that he is an alleged father.

This position is unavailing. First, the juvenile court's order was silent as to whether appellant was any particular type of father, be it alleged or presumed. In any event, the record establishes that appellant was an alleged father. The juvenile court's finding of fact on that point on May 13, 2004, still stands. Second, and more importantly, section 361.5, subdivision (b)(10) could not apply to appellant. The minor was not removed from his care and he was never given reunification services that were then terminated.

In his reply brief, appellant cites *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, a case which dealt with the prior incarnation of section 361.5, subdivision (b)(10) that contained the language which is now in subdivision (b)(11), as amended in 2001. Subdivision (b)(11) provides that reunification services need not be provided if the juvenile court finds that "the parental rights of a parent over any sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the

sibling of that child from the parent." *Francisco G.* held that this language could be applied "to a father who was only an alleged or biological father during the sibling's dependency proceeding." (*Francisco G.*, *supra*, 91 Cal.App.4th at p. 599.)

Appellant tells us he disagrees with the holding in *Francisco G.* but acknowledges that it "[makes] clear that [appellant] is indeed at risk of having section 361.5 apply to him in a future case. The fact his 'parental' rights were erroneously terminated not only as an alleged father, but as [the minor's] father, only made this future risk all the more real." We cannot accede to this reasoning. If section 361.5, subdivision (b)(11) can be applied to alleged, natural and presumed fathers, the risk to each type of father is equal. In any event, as we have indicated, the juvenile court ruled that appellant was an alleged father. Not only can appellant point to the record for proof of that fact, he can now point to this opinion.

DISPOSITION

The order terminating appellant's parental rights is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P.J.
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_____, J.
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